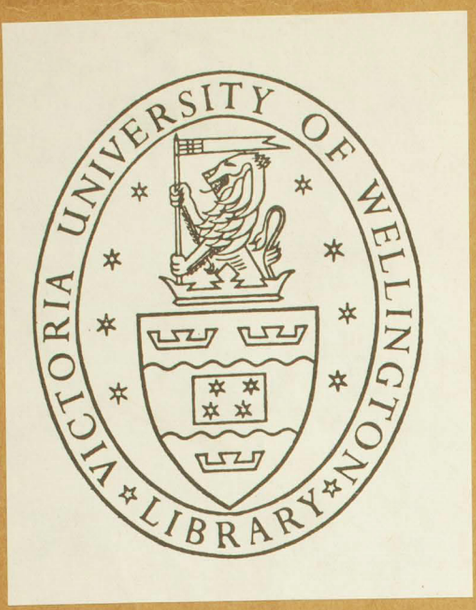
rxBA BARKER S.C. Do the rules of natural justice apply



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LAW OF BODIES CORPORATE AND UNINCORPORATE

MASTER OF LAWS 1976

STANLEY CHARLES BARKER

Do the rules of natural justice apply to a Company or a partnership?

Research paper submitted for the Degree of Master of Laws and Honours at Victoria University of Wellington, 1976.

TO WHAT EXTENT DO THE RULES OF NATURAL JUSTICE APPLY TO A COMPANY OR A PARTNERSHIP?

I INTRODUCTION:

1. What are the rules of natural justice?

The English common law recognises that there are two principles of natural justice: that no man should be condemned without first having been given adequate notice and an opportunity to be heard (audi alteram partem), and that every adjudicator be disinterested and free from bias (nemo judex in causa sua). Both of these principles are regarded as being the minimum requirement necessary for justice not merely in the administration of justice in the courts in the strict sense, but also in the determination of the much wider range of matters which are dealt with by administrative and domestic tribunals. However the phrase natural justice may be used to refer to principles other than the two fundamental principles just mentioned. In its widest sense it was at one time used as a synonym for natural law,(1) and recently the American Supreme Court in the case of Brown v Walker (2) has described the privilege against self incrimination as a part of natural justice. The Franks Committee(3) suggested that natural justice requires the giving of reasons for decisions, and the case of Rv Deputy Injuries Commissioner, ex parte Moore (4) further suggests that a body when making a decision must act only on evidence of probative value. Again the maxim of criminal law,

(1) See HH Marshall "Natural Justice" Chpt. 2
(2) 191 US 591, 600 (1896) quoted by Heydon (1971)87 L.Q.R. 214, 216
(3) Cmnd 218 paragraph 98, and see Akehurst (1970) 33 MLR 154
(4) 1965 1QB 456, 476, 487

actus non facit reum nisi memo sit rea, was described by Lord Kenyon in the early case of Fowler v Padget(1) as a principle of natural justice, while in the more recent case of Liyange v R (2) the Privy Council denied that retrospective registration was contrary to the rules of natural justice.

While the common law readily recognised the right to a fair hearing before an impartial tribunal, the willingness of the courts to interfere with the decisions of domestic and administrative tribunals on the grounds of a breach of these principles has varied from generation to generation.(3)

Throughout the nineteenth century the courts freely imputed an obligation to observe the rules of natural justice, however, by the 1950's it was possible for one writer (4) to entitle an article "The twilight of natural justice". But Wade's optimism proved ephemeral and the courts since the House of Lord decision in Ridge v Baldwin(5) have been extending the scope of the rules of natural justice so that judges once again insist that the content of the rules are flexible, which means that in all circumstances the official must act fairly. The position is such that it has spurred one judge to warn:

> "The principles of natural justice are of wide application and great importance but they must be confined within proper limits and not allowed to run wild" (6)

(1) (1798) F.T.R. 509, 514
(2) [1967] 1 A.C. 259, 283
(3) See de Smith "Judicial Review of Administrative Action" (3rd Edition) p. 136 et seq; Hewitt "Natural Justice" p.324.
(4) H.W.R. Wade (1951) 67 L.Q.R. 103
(5) [1964] AC 40
(6) Per Megarry J. in Hounslow L.B.C. v. Twickenham Garden Developments Limited [1971] Ch 233, 258.

And again in Gaiman v National Association for Mental Health[1] the judge summed up the present tendency of the courts when he stated:

> "It may be that there is no simple test, but that there is a tendency for the court to apply the principles to all powers of decision unless the circumstances suffice to exclude them."

As Lord Reid pointed out in Ridge v Baldwin[2] the courts from the 1920's onwards tended to define the duty to observe the rules of natural justice in terms of a narrow definition of the duty to act judicially. Whether a body was acting judicially or not was a question which was commonly answered by invoking the dictum of Atkins L.J. in R v Electricity Commissioners[3] who stated:

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially..."

This dictum, as Lord Reid pointed out, was interpreted to mean that a duty to act judicially was not to be inferred from the nature of the power conferred on a body alone: there had also to be a superadded duty to act judicially. But one may wonder whether the restrictive interpretation was not evidence of the courts attitude rather than the cause. The general reluctance of the courts to invalidate a decision on the grounds that there had been a breach of the rules of natural justice is evidenced by the numerous distinctions that grew up. In R v Metropolitan Police Commissioner ex parte Parker[4] a distinction was made between judicial and disciplinary powers. If the function

(1) Per Megarry J. [1971] Ch 317, 333
(2) Supra
(3) [1924] 1 KB 171, 205
(4) [1953] 1 W.L.R. 1150

of the deciding body was merely disciplinary, the rules of natural justice did not apply. Again in Nakkuda Ali v Jayaratne [1] the Privy Council drew a distinction between a right and a privilege, and again if the decision merely affected a privilege there was no right to be heard. Furthermore the decision of Maugham J. in MacLean v The Workers Union [2] clearly expressed a reluctance to interfere with the decisions of domestic tribunals. But at no time did the courts attempt a satisfactory definition of the term "acting judicially", even in the narrowest sense. [3] In fact in R v Manchester Legal Aid Committee, ex parte Brand [4] Parker J, (as he then was) summarised the case law when he said:

> "The duty to act judicially may arise in widely different circumstances which it would be impossible and indeed inadvisable to attempt to define exhaustively".

The phrase was even further relegated to the realms of uncertainty by the courts' attempted definitions of a "quasi-judicial" function. [5]

The decision of Ridge v Baldwin [6] has not removed all the uncertainty from this area of the law, and cases such as R v Gaming Board for Great Britain, ex parte Benaim [7] show that the destinction between rights and privileges has survived this case.

The significance of Ridge v Baldwin is not that it removed the uncertainty from this area of the law but that

(1) [1951] AC 66
(2) [1929] 1 Ch 602
(3) See De Smith supra p. 64 et seq.
(4) [1952] 2 QB 413, 428
(5) See Wade "Administrative Law" (3rd Edition) p. 190
(6) Supra
(7) [1970] 2 QB 417

it clearly indicated and inaugurated a complete reversal in judicial attitudes, the litigation itself in its passage through the courts showing the restrictive and liberal approaches adopted by the various judges. In this case a chief constable (Ridge) was dismissed without a hearing by his watch committee after his conduct had been criticised by a judge in the course of a trial for conspiracy to prevent the course of justice. The trial led to the conviction of a number of members of his force, but Ridge himself was acquitted. In considering Ridge's claim that the committee's decision was void, the courts were faced with two questions. Firstly, should an obligation to give a hearing be read into the statutory provisions which empowered the committee to dismiss the constable when no reference was made in the statute to a hearing; secondly, had later statutory provisions provided a right to a hearing irrespective of the meaning of the Act in question. Only the first question is relevant in the present discussion. At first instance Streatfield J. held that a right to a hearing ought to be read into the statute:

> "It is not merely an administrative matter, as a result of which some person may be prejudiced or may be deprived of the right of property, and so on; what the committee were doing here was to take a very serious step under an Act of Parliament which, of itself, gave no right of appeal - they were exercising the right to dismiss a man, to deprive him of his accumulated pension rights".

However the learned Judge held, natural justice had been complied with since the committee was entitled to reach its decision on the evidence which the chief constable himself had given in the course of the trial. Out of the plaintiff's own testimony he had convicted himself. The

Court of Appeal went even further than Streatfield J., and held that the watch committee was not under a duty to even give Ridge a hearing.

However, the House of Lords, held that the committee was under an obligation to observe the rules of natural justice and that on the facts, Ridge had not had a proper hearing. Lord Reid regarded the facts of the case as falling within the category of dismissal from an office where there must be a good cause for dismissing a person. Lord Reid's judgment did not, however, attempt to lay down any general principle. He revived natural justice by rescuing from oblivion old authorities but said nothing about new fact situations which did not fall squarely within established categories. Lord Morris similarly, founded himself on cases involving property rights and provided no general guide for the future. Lord Hodson also referred to old cases and concluded that:

> ".....where the power to be exercised involves a charge of misconduct made against the person who is dismissed...the principles of natural justice have to be observed".

Cases decided after Ridge's case while extending the scope of natural justice have made no attempt to define "judicial" or "quasi-judicial" functions Resort instead has been had to the idea of acting fairly. The concept of fairness was not unknown before Ridge's case, but it seems to have steadily gained popularity since Lord Parker C.J. (as he then was) in Re H.K. (an Infant)(1) said:

> "It is not as I see it, a question of acting or being required to act judicially, but of being required to act fairly".

(1) [1929] 1 Ch 602

This new approach will be more fully discussed in this text in the context of when the rules apply, however, it is first necessary to examine in more detail the two limbs of the rules of natural justice.

(i) Audi Alteram partem rule

> "Laws of God and Man both give man right to make his defence".

Is a dictum of Fortesque J. in R v University of Cambridge[1] reveals that the Courts took a firm stand on the principle that those who decided anything could not validly do so without giving the person or persons affected the opportunity of being heard. But what constitutes an adequate opportunity to be heard, will ultimately depend upon the particular circumstances in each case. However, a right to have a fair hearing and defend the allegations made against oneself would be illusory without sufficient notice of the allegations and sufficient time to prepare a defence. These two requirements will of course vary with the facts of the particular case. Elaborate statutory procedures must be followed when an application or appeal is made to the courts. The mere fact that a person cannot be found and cannot, therefore, have actual notice served on him does not prevent a decision being made in his absence. The New Zealand and all other Commonwealth courts as well as the courts of most developed legal systems have elaborate provisions relating to the serving of notice on parties that cannot be found.[2] A decision that has been given in absentia of a party has never been regarded as a breach

(1) (1723) 1 Str 557
(2) See

of natural justice. However the cases of Rudd v Rudd (1) and Macalpine v Macalpine (2) clearly indicate that the position is different if the rules as to substituted service have been invoked as a result of the fraud of one of the parties. (3)

Usually a party claiming that he has been denied natural justice under the audi alteram partem rule will rely on the inadequacy of the notice he has received.

In New Zealand Dairy Board v Okitu Co-operative Dairy Company Limited (4) a zoning order prejudicial to a dairy company has been made by a dairy board without giving the company a reasonable opportunity of being heard and without disclosing to the company a certain letter from a competitor. The Court of Appeal (by a majority of three to two) held that the dairy board had violated the audi alteram partem rule which it was obliged to observe. (5)

The question of inadequacy of the notice may also arise if the notice is vague or ambiguous, for example in Urban Housing Co v Oxford City Council (6) it was held that insufficient notice had been given because the demolishing of the walls was not a task which was normally in the hands of the town clerk, but the sort of thing which the city engineer would be responsible for, therefore the letter giving notice would lead to the recipient presuming that proceedings normally left to a town clerk would be taken. (7)

(1) [1924] P.72
(2) [1958] P.35
(3) For a further discussion see Dicey & Morris, "The conflict of Laws" (8th Edition) pp 318-319, & Marshall supra Chpt. 5
(4) [1953] NZLR 366
(5) See also Sheldon v Bromfield Justices [1964] 2QB 573; Marands v Mosque v Badi-Ud-Din Mahmud [1967] AC 13 [1940] Ch70
(6) [1940] Ch 70
(7) See also Sloan v General Medical Council [1970] 1 WLR 1130 ~~[1939] NZLR 504~~

Or the party will rely on the inadequacy length of time allowed to him to prepare his defence.

In Boys v Carlyan[1] only two hours notice was given and this was held to be manifestly inadequate. But occasionally situations do arise where the party involved is completely unaware of the proceedings against him.[2]

Natural justice does not require that the hearing should be oral. This proposition was settled by the House of Lords in Local Government Board v Arlidge [3] where it was held that a householder whose property had been condemned as unfit for human habitation had no right to insist on an oral hearing at the appeal to the Local Government Board against the local authority's decision. In certain situations the right to an oral hearing may resolve itself into a question of statutory interpretation,[4] or the empowering statute may give a tribunal a discretion whether to hold an oral hearing or not.[5] The general principle suggested by thecases and text writers is that there is no right to an oral hearing unless the refusal of an oral hearing would prejudice the applicant and even then the express words of the statute may take away that right. Normally written submissions in a case are sufficient if the truthfulness of the applicant is not an issue. But there are situations where the applicant does not wish to bring new facts to the tribunal's attention but to convince them that his version of a disputed story is true. In Rose v Humbles[6] Rose,

(1) [1939] NZLR 504
(2) See Fleit Mortgage v Lower Maisonette [1972] 2 ALL ER 737
(3) [1915] AC 120
(4) See Wiseman v Borneman [1971] AC 297
(5) See R v Deputy Industrial Injuries Commissioner [1965] 1 QB 456
(6) [1970] 1 W.L.R. 1061.

a taxpayer was assessed for taxation purposes. He appealed to the general commissioners against his assessment and a date was fixed for a hearing. However, the hearing was adjourned to a later date owing to the taxpayers' illness. At the date of the adjourned hearing, Rose was still unwell, the commissioners refused to grant an adjournment and determine Rose's appeal. The Chancery Division (per Buckley J.) held that the refusal of the Inland Revenue Commissioners to postpon the hearing was a substantial injustice because the whole outcome of the applicant's case depended on whether he was believed that the increase in his income was made from winnings from bets. Similarly, perhaps, a university committee deciding whether to exclude an unsuccessful student from a course might well satisfy the rules ofnatural justice by allowing only written submissions relating to the causes of his examination failure in the form of such evidence as medical certificates. But such a committee deciding whether to expel a student for alleged dishonesty'would surely' or 'might'be required to allow the student to appear personally.

The adequacy of the notice and time may be of very little help if the party to be proceeded against does not know the evidence against him. In R v Architects' Registration Tribunal, Ex parte Jagger(1) it was held that it was improper for the tribunal, which acted in a quasi-judicial capacity, to consider and give weight to evidence contained in documents, the contents and

(1) [1945] 2 All ER 131

source of which were not divulged to the applicant. It was not sufficient that the applicant was merely asked to explain certain information contained in such documents. Since the applicant was, therefore, not given a real and effective opportunity of meeting relevant allegations made against him, the motion to quash the decision of the tribunal succeeded.

In Fenton v Auckland City(1) a company proposed to build a fourteen storey block of flats which required the city council's permission. Objections to the proposed project were heard by the Town Planning Committee, but unknown to the objecting parties, the committee had a lengthy report from the city engineer summarizer, the proposals and objections and a planning officer's comments on the validity of the objections. Some of the comments were factual but some were in the nature of opinions. The committee approved the application. The Court held that the approval should be set aside on the ground of a breach of natural justice. Because of the non-disclosure of the reports, the parties had not been given an opportunity to contradict the statements. Speight J. noted that such reports might have greatly influenced the committee.

Although a person must be given sufficient details of the evidence against him and an opportunity to answer it, the Court of Appeal in R v Gaming Board for Great Britain, ex parte Benaim and Khaids(2) held that the person does not need to know the source of the evidence if the material can be fairly answered in ignorance of source. The New Zealand Supreme Court in Perpetual Trustee v Dunedin City(3)

(1) [1969] NZLR 256 Also see Kanda v Government of Malaya [1962] A.C. 322;

(2) R v Deputy Industrial Injuries Commissioner, ex parte Jones [1962] QB 677; Shareef v Comm. for Regn. of Indian & Parkistani Residents [1966] A.C. 47 [1970] 2 QB 417

(3) [1968] M.L.R. 19

held that where a party is only entitled to be heard on one issue but not another, he is only entitled to know of the material he will be heard on.

There are, of course, exceptions to the general rule that the evidence be disclosed, and in some circumstances communication of the evidence to the person seeking a hearing may be undesirable, for example, medical evidence in cases involving mental illness. In re K (an Infant)(1) which involved proceedings for custody of a child, the judge took into account a confidential report on the child submitted by the official solicitor as guardian ad litem, without disclosing it. The House of Lords held that the wardship proceedings allowed non disclosure if it was in the child's interest not to disclose it.(2)

Where there is a duty to disclose material it need not be necessary to disclose all its details but only such detail as is sufficient to outline the substance of the allegation or evidence, the general test being whether there is sufficient disclosure to give the party a fair opportunity to answer it. In Maxwell v Department v Department of Trade(3) the court held that a company inspector investigating Maxwell's affairs only had to disclose the substance of the investigation. The investigation was not in the nature of a trial, and therefore he did not have to reveal the same detail as

(1) [1965] A.C. 201
(2) See also Re P.A. (An Infant) [1971] 3 ALL ER 522; Re M (an Infant) [1972] 3 ALL E.R. 321
(3) [1974] 2 W.L.R. 338

he would if Maxwell was on trial or in some other analogous situation.

The New Zealand court has also made a distinction between material acquired outside the tribunal and material acquired by the tribunal itself. In South Otago Hospital Board v Nurses and Midwives Board[1] the plaintiff hospital, board wanted a decision of the defendant board, to cancel approval of Balclutha Hospital as a Grade A training hospital for nurses, quashed. The decision was first proposed after the defendant board had received two reports from inspectors recommending this action because of the insufficient clinical material available in the hospital. At its request the plaintiff board was given a full hearing and both reports were disclosed to them prior to the hearing. But at the hearing the plaintiff argued that the situation had improved. Therefore, the defendant board sent one of its members to hospital to see the hospital. The report of the tribunal member reaffirmed the original recommendation, thus the defendant board decided to cancel the approval without further consultation with the plaintiffs and without telling the plaintiffs what the last report said.

However, the court held that the visit to the hospital by the tribunal member, was in the nature of an extended hearing therefore it was not a case of receiving information behind the parties back, and no new or unrevealed issues were raised.

(1) [1972] N.Z.L.R. 828

But in this case there had been another report given to the defendant board before the hearing. This report had accidentally not been disclosed. Even though the substance of this report was the same as the two earlier ones Wild C.J. still held its non-disclosure was a breach of natural justice, therefore, the decision was quashed for that reason.

Similarly if a party takes a point of law before a tribunal then the tribunal can get an opinion on this point and need not disclose the opinion or give the parties a further opportunity to argue the point. In Wislang v Medical Practitioners Disciplinary Committee(1) Speight J. held that there had been no breach of the audi alteram partem rule by the divisional committee getting a legal opinion.

If there exists a right to an oral hearing there is possibly also a right to cross-examine witnesses. Some support for this view can be got from Osgood v Nelson(2) where Martin B speaking on behalf of the judges called to the House of Lords advised that the corporation of the City of London, in removing Osgood from his office, had observed the rules of natural justice since their procedure reached the standard followed in the ordinary courts. Among the elements of that procedure quoted by His Lordship was the opportunity to cross-examine witnesses. However in the University of Ceylon v Fernando(3) Fernando was excluded from the University after he had been found guilty by the Committee of the University of offences in

(1) [1974] 1 NZLR 29
(2) [1872] LR 5 H.L. 636
(3) [1960] 1 W.L.R. 223

connection with exams. The committee had given Fernando a full hearing in respect of the charges but the student who had made the original allegations had been questioned in his absence and Fernando had been given no opportunity of examining him nor had he asked for one. The Privy Council held that the Committee had satisfied the rules of natural justice although Fernando had not cross-examined the witness. But the Privy Council indicated that the decision may well have been different if he had requested to cross-examine and had been refused.

This decision has been criticised by de Smith(1) not for denying the right to cross-examine, but for expecting Fernando, who was not legally represented, to take the initiative in making the request. Support for de Smith's view may be found in Hoggard v Wornborough U D.C.(2) In this case a local authority was empowered by statute to make certain payments to a person other than the owner of property if it appeared "to them to be equitable in the circumstances". Hoggard took no steps after he was informed by the council that money was available for these payments to Hoggard's tenant. Winn J. held that this decision was a breach of natural justice because the council had to decide equitably between the competing claims, and, therefore each claim must receive consideration and each claimant must be invited.

(1) de Smith (supra) p. 188 r. 75
(2) [1962] 2 QB 93

"Not merely left to take the initiative
if he chooses to put forward the material...
which he desires to have considered" (1)

Another argument against the decision in Fernando's case is that it was a case where natural justice would require an opportunity to cross-examine because the case resolved itself into a matter of one party's word against the others'. In addition, there is a general rule that a party is entitled to be present when the tribunal receives or gathers evidence.(2)

The right to have a fair hearing may include a right to legal representation. In two recent English cases Pett v Greyhound Racing Association No. 1 Ltd(3) and Enderby Town Football Club Limited v Football Association Limited(4) the courts seem to have moved from a position that there is always a right to legal representation to the proposition that the existence of such a right depends on the circumstances of each case. In Pett v Greyhound Racing Association No. 1 the National Greyhound Racing Association Limited issued licenses to persons concerned in greyhound racing, including proprietors of race-courses and trainers of greyhounds. A holder of their licence agreed to be bound by their Rules of Racing. The rules provided for the holding of inquiries and gave power to withdraw or suspend licenses. However, the rules did not provide for the procedure to be adopted at an inquiry or deal with the rights of license holders

(1) ibid p. 100
(2) See In re Royal Commission [1962] NZLR 96, 111, 117 per North and Cleary JJ.
(3) [1969] 1 QB 125
(4) [1971] Ch 591

to be legally represented. The defendant owned and operated a racecourse licensed by the Club and the plaintiff held a club trainer's licence. Pursuant to the Rules of Racing, the defendants intended to hold an inquiry into the alleged drugging of a greyhound trained by the plaintiff. The plaintiff's solicitor wrote the defendants asking for the hearing to be adjourned so that the plaintiff could give instructions for the plaintiff to be legally represented. The defendants replied agreeing to adjourn the hearing. At the adjourned hearing the plaintiff attended with his counsel and solicitor. The defendants then adjourned the hearing so that they could consider whether they would permit him to be legally represented at the hearing. They later informed the plaintiff that they intended to hold the inquiry at a later date but they would not permit him to be so represented. The Court of Appeal issued an interlocutory injunction restraining the defendants from holding an inquiry into the running of Petts Greyhounds unless he was allowed to appear and be legally represented. Emphasis was made in the judgments of the gravity of the charge and its consequences. Lord Denning said that there may not be such a right in minor matters, although even there it seems it is a question of giving up such a right by contract. The other members of the Court of Appeal impliedly accepted this view. However at the trial - Pett v Greyhound Racing Association No. 2 (1)

(1) [1970] 1QB 46

Lyell J. despite the views of the Court of Appeal held that there was no rule of natural justice requiring a right to legal representation. His Honour was of the opinion that in the absence of express requirements in the instruments conferring quasi-judicial powers on a domestic tribunal, the tribunal was only to comply with those elementary and essential principles of "fairness" and accordingly he held that legal representation was not an elementary principle in natural justice. The Learned Judge relied on the decision of the Privy Council in Fernando's case which had not been cited in the Court of Appeal. Lyell J. regarded that case as conflicting with the views of the Privy Council and says (1) after quoting the board's reference to "elementary and essential principles of fairness":

> "I find it difficult to say that legal representation before a tribunal is an elementary feature of the fair dispensation of justice. It seems to me that it arises only in a society which has reached some degree of sophistication in its affairs".

However, it is arguable that when the Privy Council in Fernando's case referred to elementary principles it was not contrasting primitive and sophisticated societies as the learned Judge suggests but basic principles common to all courts and tribunals as opposed to the highly technical rules of evidence peculiar to common law courts. In the second case Enderby Town Football Club Limited v The Football Association Limited, the Court of Appeal emphasised that everything depends on the facts of the particular case.

(1) Ibid p. 65

The Football Association, a United company,(1) had a rule prohibiting a club which appealed to it from decisions of the various county associations, from being legally represented. The Enderby Town Football Club, also a limited company, having appealed to the Football Association from a decision of a county association, sought an injunction to prevent the appeal being heard unless the club was allowed legal representation. The Court of Appeal held that since the club could, if it wished, have sought a declaration of its legal rights from the courts it could not complain of the offending rule if it chose to submit to the appellate jurisdiction of the Football Association. All the members of the Court of Appeal discussed the right to legal representation. Both Fenton, Atkinson and Cairns L.J.J. were prepared to recognise that clubs might exclude the right to legal representation by an absolute rule. Fenton, Atkinson L.J. gave examples of statutory exclusions of the right and referred to the paucity of case law on the subject. He concluded (2)

> "If such a rule is indeed contrary to natural justice, a very large number of persons, including our legislators, must have been very insensitive over a long period of years to what natural justice requires". (3)

Lord Denning relenting from what seemed to be the absolute rule he had propounded in Pett's Case admitted that it might be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal

(1) A point which is further discussed post p.
(2) [1971] Ch 591, 609
(3) See further Gaiman v National Association for Mental Health [1971] Ch 317. where Megarry J. held that the wholly unrestricted expulsion powers in the articles excluded the principles of natural justice.

Page missing ?? (one word?)

representation —

> "Justice can often be done in them better by a good layman than by a bad lawyer" (1)

And further on in his judgment Lord Denning said that the right to representation depends on the discretion of the tribunal which must be genuinely exercised. In Pett's case the court had intervened because the Greyhound Racing Association had an inflexible practice of refusing representation. A rule, therefore, which purported expressly to exclude a right to representation would be void.

> "If they lay down a procedure which is contrary to the principles of natural justice they are invalid. (2)

Unless, of course, it could be construed as directory and not imperative, so that the tribunal could allow legal counsel to be present in appropriate cases where fairness demanded it".

Finally it is necessary to consider problems which may arise in large organisations such as government departments, regulatory bodies or universities. Does the right to a hearing involve the right that he who hears also decides? This question may arise,for example, in connection with a University Council which wishes to delegate the collecting of evidence and the making of decisions, or at any rate recommendations, to a small disciplinary committee. In this situation is it necessary to distinguish the making of the decision which cannot be delegated, from the collecting of evidence. So far as the making of the decision is concerned there is no need to invoke any maxim such as that judicial powers cannot be delegated for that simply re-introduces the

(1) ibid 605
(2) ibid 606

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unsatisfactory concepts which have been abandoned by the courts in other areas of the law.(1) Moreover, any rule against delegation of decision-making is a strong presumption rather than an absolute prohibition, or at least this was the view of Paull J. in In re S (a Barrister)(2)

> "...assuming that (counsel) is correct in his contentions that a judicial or quasi-judicial duty cannot as a matter of general principle be delegated the question to be determined would be whether, in the interests of justice, delegation in this particular case can and should be allowed".

In many cases the solution will be found in the construction of the statutory provisions or the contractual terms(3) In other cases the solution may be a finding of fact, that is, whether or not delegation is possible, it has not on the facts before the court, occurred. A large body which delegates to a committee the power to conduct a hearing and receive evidence is not delegating its powers provided the evidence collected is laid before the body making the final decision. However if the appointed committee does not transmit to the parent body the evidence it has received, then a question of the validity of the delegation will occur.

In Jeffs v New Zealand Dairy Production Marketing Board(4) the Privy Council held that the New Zealand Dairy Production and Marketing Board was empowered by legislation to determine zoning questions, even if its

(1) See Richmond J, in Turner v Allison [1971]NZLR 833,855-857
(2) [1970] 1 QB 160, 172
(3) See for example Barnard v NDLB [1953]2QB 18 and Vine v N.D.L.B. 1957 AC 488
(4) [1967] N.Z.L.R. 1057

pecuniary interests might be effected. Nevertheless, while the Board itself has authority to hear and receive oral or written evidence on questions of zoning and could delegate that authority to a person or persons acting for it, the Board must act judicially, that is to say, the Board was under a duty itself to consider all the evidence so offered. As the board failed to do so, it had failed to hear the interested parties before deciding the issues involved. The appeal from the judgment of the New Zealand Court of Appeal was allowed affirmed.

In deciding whether or not a delegation is permitted by natural justice, the courts are willing to pay close regard to the practical realities of the situation before them.(1)

(ii) Nemo iudex in re sua

The requirement of impartiality by the adjudicator issometimes expressed in the form nemo iudex in re sua or no man should be a judge in his own cause. This form of expressing the rule is of particular interest since the Court of Appeal decision in Hannam v Bradford Corporation.(2) The facts of this case can be briefly stated as follows; Hannam, a school-master, had been dismissed by the school governors. This decision was confirmed by the staff sub-committee of the local education committee. The Chairman of the sub-committee was a governor of Hannam's school and two other governors were also members of the

(1) See Ex parte Forster; Re University of Sydney (1963) S.R.(NSW) 723, 733
(2) [1970] 1 W.L.R. 939

sub-committee although none of the three had attended the governors meeting at which the decision to dismiss Hannam had been taken. Although the courts held that Hannam was not entitled to the remedy he sought all three judges, agreed that the decision of the sub-committee could have been successfully attacked for bias if the appropriate procedure had been used. While Widgery and Cross L.J.J. merely spoke in general terms of bias, Sachs L.J. (1) distinguished between "bias" and

> "...a slightly different ground on which it was abundantly clear that the staff sub-committee decision could not stand. No man can be a judge of his own cause. The governors did not, on donning their sub-committee hats, cease to be an integral part of the body whose action was being impugned and it made no difference that they did not personally attend the relevant governors' meeting".

However, leaving aside for the moment the applicability of Sach's LJ's "slightly different ground" it is still believed to be of fundamental importance that judges and other adjudicators are free from partiality, or at least from those biases which society regards as undesirable in a judge. The attributes required by a judge can best be stated in the words of Robson: (2)

> "Society demands that its judges be biased in certain directions no less insistently than it demands they shall be unbiased in others. A man who had not a standard of moral values which approximated broadly to the accepted opinions of the day, who had no beliefs as to what is harmful to society and what is beneficial, who has no bias in favour of marriage as against promiscuous sexual relations, honesty as against deceit, truthfulness as against lying, who did

(1) ibid 942
(2) Robson "Justice & Administrative Law" (3rd Edition), p.410 See also Gee v Freeman (1959) 16 D.L.R. 65, 74 "a judge who tries a theft charge may safely be assumed to be against theft.

> not think wealth better than poverty, orthodox religion preferable to atheism, courage better than cowardice, constitutional government more desirable than anarchy would not be tolerated as a judge on the bench of any western country".

The common law distinguishes between two types of bias, that arising from having a financial interest and that arising from such causes as relationship to a party or witness. The former type of bias is described as giving rise to an interest, whereas the latter type is described as a challenge to favour.

(i) Bias giving rise to an interest

Under this head, any direct pecuniary interest, regardless of how small it might be, is sufficient to disqualify a person from acting as a judge. The locus classicus in this area of the law is the case of Dimes v Grand Junction Canal[1] In this case litigation between the canal company and the Lord of the manor, from one of whose copyholders it had brought land, had occupied the courts for over ten years, before Lord Cottenham L.C. pronounced a decree in favour of the company. Dimes, the Lord of the manor, discovered that the Lord Chancellor owned over ninety shares in the canal company and therefore recommenced the action. The House of Lord's set aside Lord Cottenham's decree on account of his pecuniary interest. It was said by Lord Campbell:

> "No one can suppose that Lord Cottenham could be, in the remotest degree influenced by the interest that he had in this concern, but, my Lords, it is of the last importance that the maxim

(1) (1852) 3 H.L. cases 759. Blackstone (3 Comm 299) cites a case from Y.B. 8 Hen. 6,18,20 in which the Chancellor of Oxford claimed under a charter of Richard II the power to try an action of trespass brought against himself which was disallowed - see Hewitt "Natural Justice" p.22

> that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took part in the decision, and it will have a most salutary influence on these tribunals when it is known that this Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence".

Although a judge is not disqualified from hearing an appeal because the case is on appeal from his own previous decision R v Hertfordshire Justices(1) demonstrates that a Judge may be disqualified from hearing an appeal if he has a financial interest in the outcome. In this case a magistrate was disqualified from sitting at Quarter Sessions on an appeal from a decision of his own as he had a financial interest in the outcome because of his contingent liability for costs if the applicant was successful.(2)

In order to disqualify a judge on the grounds of bias under the present head, the financial interest must be direct. In R v Rand(3) the Bradford Corporation were the owners of waterworks, and were empowered by statute to take the water of certain streams, without first getting the permission of the mill owners, on obtaining a certificate of the justices that a certain reservoir was

(1) (1845) 6 QB 753

(2) See also R v Hendon District Council Ex parte Charley [1933] 2 K.B. 696

(3) [1939] 2 ALL ER 535

completed, of a given capacity, and filled with water. An application was made to the justices accordingly, which was opposed by the mill owners, but after due inquiry the justices granted the certificate. Two of the justices were trustees of a hospital and friendly society respectively, each of which had lent money to the corporation on bonds charging the corporate fund. Neither of the justices could by any possibility have any pecuniary interest in these bonds; but the security of their cestui qui trust would be improved by anything improving the borough's funds and the granting of the certificate would indirectly produce that effect, by increasing the value of the waterworks. There was no grounds to doubt that the justices had acted bona fide. The challenge by the mill owners on the ground of financial interest failed because the justices could not personally be financially affected as a result of the granting of permission.

Therefore, although any pecuniary interest, however small, in the outcome of the dispute disqualifies a person from acting in a judicial capacity, the mere possibility of bias in favour of one of the parties does not ipso facto avoid the justices decision. In order to have a disqualifying affect the bias must be shown at least to be real.

(ii) Bias giving rise to a challenge to favour.

This type of bias arises from the personal ties existing between the judge and a party or witness to the action. For example in Cottle v Cottle[1] the chairman of a bench of

(1) [1939] 2 ALL E.R. 535

magistrates hearing a summons brought by a wife against her husband was a friend of the wife's mother. This relationship was enough to disqualify him from deciding the case. Another example may arise where a magistrate dealing with licensing applications is a member of an organisation campaigning against the sale of alcohol or when, for any other reason the same person is both accuser and judge.(1)

While it might seem obvious that a person sitting on appeal from his own previous decision would be held to be biased, the common law has in fact taken the opposite approach. A judge except where he is expressly debarred from doing so by the words of the statute may in fact hear an appeal against his own decision without attracting a presumption of bias.(2)

To be distinguished from the situation o f a judge hearing an appeal from his own decison is the situation where a tribunal realises that its first hearing was in breach of the rules of natural justice and resolves to give the matter a second full and fair hearing. While such a procedure does not of itself violate the rules of natural justice the fairness of the subsequent proceedings will be closely scrutinized by the Courts. Where the tribunal is the only body with jurisdiction and its first decision has been quashed by the court the doctrine of necessity will be available to justify its second hearing.(3)

(1) See Law v Chartered Institute of Patent Agents [1919] 2 Ch 276
(2) See de Smith (supra) p. 240 et seq.
(3) For a further discussion of this concept see Wade supra pp. 214-215.

Normally the courts do not enquire whether a tribunal was in fact biased, although this may occasionally be relevant. Where the disqualifying element is a pecuniary interest.

> "The law does not allow any further inquiry as to whether or not the mind was actually biased by the pecuniary interest" (1)

However, where the allegations of bias arises from non-financial factors it is necessary to satisfy a test which has been variously described as involving "a real likelihood of bias" and "a reasonable likelihood of bias". Although there is a great amount of authority(2) suggesting what these two phrases might mean; it is submitted that they do not indicate a real difference of opinion on the correct test to apply, but rather the existence of a confusing variety of ways of describing one test and a difference of judicial opinion on what ultimately is in each case a question of fact,no more capable of precise definition than the question "was this conduct negligent?" It is this requirement of proving a likelihood or suspicion of bias in certain cases that lends interest to Sach's L.J.'s suggestion in Hannan's case that an allegation that a man has been a judge in his own cause is a slightly different ground of challenge.(3) However, with respect to His Lordship, it is submitted that the concept of judging ones own cause is better regarded as raising a challenge to favour, differing perhaps from other challenges in raising,

(1) Per Bowen L.J. in Leeson v G.M.C. (1889) 43 Ch D.336,384
(2) Described in Hannam v Bradford Corporation [1970] 1 W.L.R. 937, 945 by Widgery L.J. as a "somewhat confusing welter of authority"
(3) See supra p. 13

without more, a real likelihood of bias.

Lord Hewart C.J. in R v Sussex Justices[1] stated the justification for the principle of quashing a decision irrespective of a Judge's actual bias when he remarked:

> "[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

But having accepted Lord Hewart C.J's dictum, every judge must also agree that a decision should not be set aside on:

> "The mere vague suspicions of whimsical, capricious and unreasonable people...mere flimsy elusive morbid suspicions should not be permitted to form a ground of decision (2)

Once, however, it is accepted in a particular case that the allegation is more than "a flimsy elusive morbid suspicion" it becomes necessary to settle what further test or tests must be satisfied before the decision can be set aside. Some judges clearly believe that there are different tests laid down in the cases and that it is necessary to choose the correct one,[3] a problem which Hannan's case has done little towards resolving, since all the members of the court agreed that however the test for bias was formulated it would be satisfied on the facts before them. Perhaps in the final analysis the answer turns on the view the court takes of the facts of the case before them. A judge who says there is no real likelihood of bias would just as likely say there was no reasonable suspicion of bias, and conversely a judge who is prepared to find a reasonable suspicion of bias is hardly likely to deny a real likelihood of bias.

(1) 1924 1 KB 258, 259
(2) Per Lord O'Brien C.J. in R v Queens County Justices 1908 2 IR. 285, 294
(3) See for example R v Barnsley Licensing Justices 1960 2 QB 167, 187, Metropolitan Properties v Lannon 1969 1QB 577, especially at p.599 per Lord Denning M.R.

2. WHEN DO THE RULES APPLY?

The tendency of the courts in recent times is to apply the rules of natural justice to a very wide range of decision-making processes. However, the courts have failed to provide any satisfactory general test to determine when they are applicable. Until a few years ago the duty to give an unbiased hearing was defined as lying on any body acting judicially - a very vague concept indeed.(1)

As was previously stated, the courts never attempted a satisfactory definition of"acting judicially" and at times the courts seemed to be saying that as the body or person before the court ought to observe the rules of natural justice it was, therefore, acting judicially. While some writers(2) suggest that nothing would be lost by abandoning all references to the existence of a duty to act judicially, the courts continue to refer to this concept(3) and even talk of "quasi-judicial" functions(4)

A single test of fairness as formulated by Parker C.J. in Re H.K. (An Infant)

> "[It] is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly".

would settle both the question as to whether the rules apply and as to what are the contents of the rules. This test has been adopted in certain areas of the rules, for example, the courts, when deciding on applicant's right to have legal representation at a hearing, will adopt the fairness test.

(1) Supra p.2 (2) De Smith, supra p.
(3) See for example Re Godden [1971] 3 ALL E.R. 20
(4) See for example Re Godden ibid, per Salmon L.J. and Glynn v Keele University [1971] 1 W.L.R. 487, per Pennycuich V.C. and Pearlberg v Varty [1972] 2 ALL ER 6

Thus in Re Pergamon Press Limited[1] the Court of Appeal held that inspectors conducting an inquiry under the Companies Act 1948 must act fairly which meant that the directors had to be given a hearing but it did not mean they had the right to cross-examine witnesses. Lord Denning said[2]

> "I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative".

And Sachs L.J. said[3]

> "...as recent decisions have shown, [it] is not necessary to label the proceedings "judicial" "quasi-judicial", "administrative" or "investigatory": it is the characteristics of the proceeding that matter, not the precise compartment or compartments into which it falls"

However, one problem with a single test of "fairness" is that there can be difference of opinion as to what fairness demands in a particular circumstance. The courts may have given the impression of extending the scope of natural justice by using an all embracing test of fairness but in fact, they have at the same time, stultified the effect of the extension by the content that is given to the rules of natural justice in particular cases.[4]

(4) See Birtles (1970) 33 M.L.R.559 especially p.561

Whether the courts talk of a judicial junction or fairness the decision whether or not to apply the rules of natural justice to a particular situation seems to be a question of policy.(1) If only for this reason, the fairness test is preferable since that approach emphasises the necessity of balancing various factors, whereas the "acting judicially" test can lend itself to the "sterile conceptualism" that Birtles speaks of.

Some judges(2) argue that instead of the "fairness" test replacing the "acting judicially" test in determining whether or not the rules of natural justice apply, it has created a distinct concept from that of natural justice. This means, in effect, that there are two separate questions to be asked; firstly "do the rules of natural justice apply to a particular circumstance?" If the answer to that question is no, then it must be asked "what does fairness require?" However, the writer submits that there is little to be gained by adopting such a twofold test, as it does nothing to solve the difficulties of defining "judicial" and "quasi-judicial", little or nothing to extend the boundaries of natural justice and is not, therefore, in step with the modern trend, and finally such a test would merely serve to add further difficulties, in that it is difficult to see what fairness would require of the official if he was not required to give an unbiased hearing under the rules of natural justice.

(1) See for example Lord Wilberforce in Malloch v Aberdeen Corporation [1971] 1 W.L.R. 1578, 1594

(2) See for example Lord Pearson in Pearlberg v Harty [1972] 2 ALL E.R. 6, 17, and the Court of Appeal in Re Liverpool Taxi Owners Association 1972 2ALL E.R. 559

The courts when discussing the applicability of natural justice have resorted to a number of particular factors. In Gaiman v National Association for Mental Health[1] Megarry J. suggested that:

> "It may be that there is no simple test, but that there is a tendency for the courts to apply the principles to all powers of decision unless the circumstances suffice to exclude them. These circumstances may be found in the body or person making the decison, the nature of the decision to be made, the gravity of the matter in issue, the terms of any contract or other provision governing the power to decide".

It is proposed to use the circumstances numerated by Megarry as factors supporting a submission that natural justice is applicable in certain situations such as the gravity of the matter at stake, however, special emphasis will be paid to factors which lead to an exclusion of natural justice as for instance the triviality of the decision.

(i) The person or body making the decision

There is little doubt that the rules of natural justice apply to proceedings in a court of law and to tribunals such as the disciplinary committee of the Law Society, which so closely resemble the ordinary courts as to enjoy their absolute privilege under the law of libel.[2] But at the other end of the scale are decisions by Ministers. In such cases the rules of natural justice may apply - particularly in its current guise of fairness, and the present trend of the courts - but even then the standard of

(1) [1971] Ch. 317, 333
(2) See for example Addis v Crocker [1961] 1QB 11 and Leeson v General Medical Council (1889) 43 C.L.D. 366; Mayes v Mayes [1971] 1 W.L.R. 679

impartiality expected of the Minister may be far from that normally expected.(1)

(ii) The Nature of the decision to be made.

"Bias" according to Lord Thankerton in Franklin v Minister of Town and Country Planning(2) was a term to be confined to those who hold judicial or quasi-judicial office. But Franklin's case may be explained as turning purely on a point of statutory interpretation, or simply as another example of the judicial attitudes of non-intervention which prevailed for a period during and after World War 2.(3) The recent trend of the courts suggests that Franklin would not be followed today. Cases on the right to a hearing show the reluctance of the courts to interfere in areas where the nature of the decision is regarded by the courts as being peculiarly discretionary, for example the admission and deportation of aliens.(4)

A long line of cases illustrate the difficulty of reconciling the rules of natural justice with the use by a Minister of knowledge already in his or another department, apart from that obtained in the particular inquiry in question, and the acquisition by the Minister of further evidence before coming to a decision.(5) Here as elsewhere in the area

(1) See for example Franklin v Minister of Town & Country Planning 1948 ~~xWxkxRxx679~~ AC 87
(2) 1948 A.C. 87
(3) See Wade (supra) p.52 and Smith supra p.
(4) See Ex parte Venicoff 1920 3 KB 72 R v. Governor of Bixton Prison ex parte Soblen 1963 2QB 243, Schmidt v Secretary of State for Home Affairs 1969 2 Ch. 149
(5) See Wade supra pp 194 et seq; Griffiths & Street supra pp 171 et seq.

of the law the trend is towards extending the rules of natural justice.

Cases can be produced to support the view that natural justice does or does not apply to decisions of such varying bodies as university vice-chancellors and examiners, the committees of gentlemen's clubs, disciplinary committees of trade unions, architects and bishops. However, many of these cases can best be discussed in connection with the other factors, such as the gravity of the consequences of a tribunals' decision or the question of interference with property rights.

(iii) The gravity of the matter in issue.

The gravity of the consequences of a decision is a further factor to which the courts have repeatedly referred although there is a varying opinion among the judges on what consequences are grave. In R v Senate of University of Aston, Ex parte Roffey[1] the court in holding that natural justice applied to a body of examiners which considered academic and non-academic matters, took into account the consequences of the decision.[2] Again in Re Pergamon Press[3] the Court of Appeal emphasised the gravity of the consequences of the publication of the inspector's report. However in Schmidt v Secretary of State for Home Affairs[4] the plaintiff

(1) [1969] 2 ALL E.R. 964
(2) See ibid p. 975
(3) Supra
(4) Supra
(5)

was refused a right to a hearing before the Secretary of State decided not to extend his permit. No doubt Mr Schmidt would have considered he had as much to lose as the students did in Ex parte Aston's case.

If a proprietory right is affected it is without doubt that the courts will regard the decision as having a grave consequence and therefore attracting compliance with natural justice. In Gaiman v National Minister for Mental Health(1) Megarry J. said

> "The mere membership of an association, involving no real interest in property and no question of livelihood or reputation, does not seem to be prima facie a matter in respect of which there is any strong claim to have the principles of natural justice, at any rate on motion".

However, the proprietary right is not necessarily of economic value. In Gaiman's case for example, Megarry J. took into account, inter alia the existence of a set of statutory rules governing companies and their members and the duty of the council to the company as a whole which might require great speed whereas natural justice would involve delay. On the other hand expulsion from a gentleman's club involving interference with property rights does require a fair hearing.(2)

The meaning, therefore, that the courts attach to "right" is obviously of great importance if interference with a "right" is made an element in assessing

(1) [1971] Ch 317, 336
(2) See Cassel v Inglis [1916] 2 Ch 211, Lee v Showmen's Guild [1952] 2 QB 329

the applicability of natural justice. The courts have given a very wide definition to the term "rights" and have held it includes such rights as the "right to work",(1) and will protect such a right by resorting to the rules of natural justice, at least where the complaint is against a union for expulsion from membership. The master-servant relationship has always been regarded as the classic case where natural justice does not apply, but even here Lord Wilberforce in Malloch v Aberdeen Corporation(2) although he threw no doubt on the traditional rule, warned that it must be used carefully and confined to pure master and servant cases where there is no element of public employment or service, no support by statute, nothing in the nature of an office or status which is capable of protection. Following this approach to the meaning of right is the dictum of Lord Denning in Schmidt v Secretary of State for Home Affairs(3) where he said that the availability of natural justice depends on the existence of "some right or interest or ... some legitimate expectation of which it would not be fair to deprive without hearing what he has to say". Applied to the facts of this case Lord Denning held that an alien who was refused permission to extend his stay in a country beyond the period originally granted had no right to

(1) See Wedderburn, "The Worker and the Law" pp 457 et seq.
(2) [1971] 1 W.L.R. 1578, 1595
(3) [1969] 2 Ch. 149

to a hearing. If, however the permission to stay had been revoked before the expiration of the time originally granted, he might well have had a right to a hearing because he had a legitimate expectation that he would be allowed to stay for the period originally granted.

Cases in the 1950's such as Nakkuda Ali v Jayarante(1) and R v Metropolitan Police Commissioner ex parte Parker(2) when natural justice was out of favour, made a distinction between a right and a privilege. This distinction was once again revived by the Court of Appeal in R v Gaming Board of Great Britain ex parte Benain.(3) However, it is submitted that what fairness on natural justice demands may vary from case to case and the law is not likely to be helped by reliance being placed on imprecise distinctions such as between right and privilege. A licence to run a casino is as closely connected with the "right to work" as membership of a trade union. However unattractive the distinction between a right and a privilege may be, the actual finding in Benaim's case may be regarded as a reasonable attempt at reconciling a public policy with a private interest.

(1) [1951] AC 66
(2) [1953] 1 W.L.R. 1150
(3) [1970] 2QB 417. This case was criticized for its "sterile conceplualism" by Birtles [1970] 33 M.L.R. 559, 561 and praised by H.W.R. Wade [1970] 86 LQR 309 for setting the law "on a better course" and taking away "a jumble of confusion".

(iv) The terms of any contract or other provision governing the power to decide.

In this final factor in Megarry J's category in Gaiman's case the contract or statute may expressly exclude the rules of natural justice which would otherwise apply, or they may by their terms strengthen the argument that the rules of natural justice apply. In the latter situation the statute or contract, in its simplest terms will provide that expulsion from a social or profession may only take place after an inquiry.(1)

Of more difficulty is the situation where the contract or statute is silent as to whether a hearing is required. Whether the courts will imply a right to a hearing in this situation seems to depend very much on the factors already discussed. However, it may be that the silence of a contract is sufficient to tip the balance against the applicability of natural justice, although if natural justice prima facie applies the courts may be very reluctant to construe the contract as excluding the rules of natural justice. In John v Rees(2) a clause in the constitution of the Labour Party empowered a Branch to take

(1) See Labouchere v Earl of Wharncliffe (1879) Ch.D. 346 (expulsion from a club); G.M.C. v Spackman [1943] A.C. 627 (s29 of the Medical Act 1958 allowed the G.M.C. to strike a doctor off the register after a "due inquiry".

(2) [1969] 2 W.L.R. 1294

> "any action it deems necessary...whether by... disapplication of an organisation or expulsion of an individual or otherwise".

There was nothing in the rules or constitution of the Labour Party which excluded the application of the principles of natural justice even though what was here in issue was suspension and not expulsion. It was held that the resolutions suspending the activities of a divisional Branch and the rights of its officers to handle its funds, and the other resolution authorising the national agent to re-organise it were nullities, since in both cases those who were suspended were not given an opportunity to be heard in answer to certain charges.

It is not easy to see why silence in a contract should be of any great importance in deciding whether a right to a hearing exists, and even more difficult of more difficulty is the situation where the court is asked to imply a term into a contract. In Lawlor v Union of Post Office Workers[1] Ungoed Thomas J. accepted counsel's contention that:

> "the rules of natural justice can only be implied in a contract (i) if they are not inconsistent with what is expressed in the contract and (ii) if they are necessary to carry it out and therefore must have been extended by the parties, and not merely if the rules of natural justice make the carrying out of the contract more convenient and might have been included if the parties had thought about it".

Although in this case Ungoed Thomas J. was able to imply a right to a hearing the danger of this narrower approach

(1) [1965] Ch. 712

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is illustrated by the refusal of the majority of the Court of Appeal in Abbott v Sullivan[1] to imply a term that a disciplinary committee of a union would not expel a member without a hearing. Trietal[2] points out that the rules of natural justice should not be regarded as rules whose incorporation into a contract has to be proved but as "terms implied by law" which can be implied "although it is by no means clear that the parties would have agreed to incorporate them in their contract... They are in truth, simply duties imposed by law on the parties to particular kinds of contracts".

The attitude of the courts to the situation where the statute is silent on the applicability of natural justice is clearly demonstrated by the old case of Cooper v Wardworth Board of Works[3] which still represents the prevailing attitude. The Court of Common Pleas held that the Board of Works could not exercise its power to demolish property without first giving the owner a hearing. Willis J. said[4]

> "A tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects is bound to give such subjects an opportunity of being heard before it proceeds".

And Byles J. said: [5]

> "Although there are no positive words in which a statute requiring that the party shall be heard, yet the justice of the Common Law will supply the omissions of the legislature".

(1) 1952 1K.B. 189
(2) Trietal "The Law of Contract" 2nd pp 165-168
(3) (1863) 14 CBNs 180 (4) ibid 190
(5) ibid 190

It is therefore, the gravity of the consequences of the dispute which will import a right to a hearing into the statute in question.

Of more interest to the purpose of this text is whether the rules of natural justice can be excluded by the express terms of a contract. Trietal[1] following his comment on the nature of terms implied by law says:

> "like many other legal duties, they can usually be excluded by contrary agreement".

With respect to that writer, it is submitted that it does not necessarily follow that the courts must, or in fact, should allow parties the same freedom to exclude the rules of natural justice as they have to settle other terms as for example the price. The dictum of Megarry J. in John v Rees[2] that

> "in the process of construction the courts will be slow to conclude that natural justice has been excluded"

may be just as applicable to the question whether public policy allows the waiving of a right to a fair hearing by express terms as it is to the construction of the contract where no such term is included. If, however, strictly construed, a contract does purport to exclude the rules of natural justice then a question of public policy arises but this is a question to which the courts, so far have not had to give an answer.

(1) Supra p. 168
(2) 1949 1 ALL ER. 109, 118.

Lord Denning has frequently expressed the view about the impossibility of excluding the rules of natural justice by contractual terms.(1) However his views may be explicable under a "mans right to work".

In Russell v Duke of Norfolk(2) Tucker L.J. said:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth".

The Lord Justice was prepared to hold that under the rules of the Jockey Club the stewards could withdraw Russell's licence without a hearing. Denning L.J. on the other hand, concluded that terms purporting to exclude natural justice were probably contrary to public policy at least in some cases.

The Supreme Court of Victoria in R v Victorian Licensing Court, ex parte Beggs(3) held that the right to be heard may be lost by contracting out. In this case, upon the proper construction of the Power of Attorney contained in the lease of the hotel, the licensee was not at liberty to oppose the application made by the owner to the Victorian Licensing Court. Consequently, the Court was right in declining to hear the licensee in opposition to such application. In the course of his judgment, Gowans J. said(4) after repeating Tucker L.J's

(1) See Russell v Duke of Norfolk [1949] 1 ALL E.R. 109
Edwards v S.O.G.A.T. 1971 Ch.
(2) [1949] 1 ALL ER. 109, 118.
(3) [1964] V.R. 48
(4) ibid pp 52, 53.

speech quoted above

> "..., whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case...But even this right may be lost to the person concerned (subject to considerations of public policy) if he has contracted himself out of its exercise in such circumstances that the tribunal must have regard to his contract and its effect, but that opportunity to be heard on the existence of his contract and its effect; but that opportunity being afforded, and the tribunal having determined correctly that the effect of the contract is that he has not the right to be further heard, it is, in my opinion, no infringement of the principle to deny the opportunity of further hearing".

It is of interest to note that Citrine(1) suggest that the weight of authority supports the view that the rules of natural justice may be expressly or impliedly excluded, but Grunfield(2) suggests a contra approach.

It is, therefore, well established that an uncorporated trade unions and professional bodies are bound to observe the rules of natural justice when considering expelling a member, that they are bound to

(i) follow the procedures laid down in the constitution of the organisation.

(ii) inform the member of what is alleged against him.

(iii) Avoid unnecessary bias in constituting the tribunal and;

(iv) Give the member an opportunity to be heard.(3)

However, there is a question, whether a company which is in effect an incorporated professional association, or a partnership is subject to the rules of natural justice

(1) Citrine "Trade Union Law" p.281
(2) Grunfield "Modern Trade Union Law p.194
(3) See Lee v Showmen's Guild of Great Britain [1952] 2QB 329, Taylor v National Union of Seamen [1967] 1 W.L.R. 532 Johns v Rees [1969] 2 W.L.R. 1294 Faramus v Film Artistes Association [1964] AC 925, 941, 947.

which apply when the association or its governing body is considering whether a power to expel a member should be exercised.

II DO THE RULES OF NATURAL JUSTICE APPLY TO A COMPANY?

It is a well settled principle of company law that persons with powers of control of a company are under a duty to use their power bona fide for the benefit of the company as a whole. This principle applies equally well to a company formed for some non-commercial purpose as it does to a company formed for some commercial or trading purpose, but there is a question whether there is superadded some further obligation to observe the rules of natural justice.

The leading English authority is the decision of Megarry J. in Gaiman v. National Association for Mental Health[1] In this case the association, a company limited by guarantee, was a highly reputable charitable body concerned, inter alia, with the preservation of mental health and the prevention and treatment of mental disorders. The Association had a council of management. The rate of membership applicants had been steadily increasing, some of these applicants appeared to be Scientologists, as well as some of the existing members. The existing members suspected of being Scientologists were expelled by the Council, without any notice or hearing. It was provided by the articles of association of the Company article that:

> "A member of the association shall forthwith cease to be a member:-
>
> (A) ...
>
> (B) If he is requested by resolution of the Council to resign, but so that a member so requested to resign may within seven days after notice of the resolution shall have been given to him by notice in writing to the Secretary of the association appeal against such resolution to the association in general meeting, in which case the council shall with all reasonable

(1) [1971] 1 Ch 317

> despatch convene a general meeting to consider the matter, and in the event of the appeal being successful, the resolution requesting the member to resign shall be void ab initio"

Eight of the Scientologists expelled issued a writ and notice of motion claiming rights of membership of the association and injunctions against the holding of the association's impending general meeting without permitting them to attend and vote. The plaintiffs contended, inter alia, that article 7(B) had been applied invalidly in that the principle of natural justice had not been complied with.

Megarry J. agreed that the principles of natural justice had not been complied with but held that those rules did not apply to the expulsion of the members from a company so as to afford them a right to be heard before expulsion. His Honour's reasons for reaching the conclusion he did were fourfold. Firstly, the council owed a duty to the association to exercise its powers under article 7(B) in what it believed to be the best interest of the association, and if necessary with great speed, whereas natural justice would involve delay; secondly, articles providing for the expulsion of members in the case of companies limited by shares had been shown to be valid, therefore, they were also valid in the case of companies limited by guarantee where the members had only limited property rights; thirdly Article 7(B) gave an absolute and unrestricted power and the wording militated against any exercise of the principles of natural justice; fourthly, this was not a case where issues of importance and gravity beyond mere membership of the association were at stake.

It is suggested however, that some of the reasons tendered by Megarry J. are possibly incorrect on the general principle of natural justice. His main reason seems to have been that he was

faced with a company limited by guarantee. Thus, according to His Honour, the company was a legal entity whose powers had to be exercised for the benefit of that entity, and those exercising the powers of expulsion were bound not merely by their duties towards the other members but also by their fiduciary duties towards the company, which might be inconsistent with the observance of natural justice.(1)

It is clearly established that many of a director's rights and powers are to be exercised for the benefit of the company rather than himself or a fraction of the company alone. He and the company are not at an arm's length relationship, in fact, the company is completely dependent upon him. A A director shares with an agent and a trustee the characteristic of being in a fiduciary relation: one in which one of the parties, the fiduciary, has rights and powers which he is bound to exercise for his company. The duty imposed on directors in the exercise of that power is one of good faith, which in reality has two aspects. In the first place it demands that the director act bona fide for the benefit of the company, and in the second place it requires that even though he may in fact have acted bona fide for the benefit of the company, he must not allow himself to fall into a situation in which his interests conflict, or may possibly conflict with those of the company. Lord Cransworth L.C. in Aberdeen Railway Co. v. Blaikie Brothers(2) said :

> "[It] is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect".

(1) Ibid p.336 C-D
(2) (1854) 2 Eq. Rep. 1281, 1286

Professor Parsons[1] is rather critical of the contrast between the stern duty of good faith which the courts have imposed on directors and the somewhat loose standard of care they have asked of them.

> "Judges, we are told are equipped to assess good faith but generally they lack the commercial experience on what to found the fine distinctions which would be called for if the law imposed something more than a relaxed standard of care. Reassuring observation is offered to the effect that, so long as the law ensures that directors' hearts are pure, it may not matter that some directors are incompetent".

It is, therefore obvious that the fidiciary duties do not afford as much protection to minorities as the principles of natural justice. In Gaiman's case[2] Megarry J., had already rejected a submission by the plaintiff's counsel that the council of the Association had acted in breach of their fiduciary duty towards the association and held that their action was in the best interest of the association. When the courts speak of the directors acting for the benefit to the company as a whole they do not mean the abstract corporate entity but the members as a whole. Sealy[3] suggests that the reason for this concept is historical: in the unincorporated deed of settlement company from which the present registered company is descended the members were the company and the subsequent introduction of incorporation did not disturb the idea that the directors should have the benefit of all the members in mind.

It is always easier to decide whether an act of the directors is bona fide for the company's benefit if they are

(1) "The directors duty of good faith" (1967) 5 Melb. Uni. L.R.395
(2) Supra pp 330 H-3331
(3) Sealy 1967 Camb. LJ 35.

dealing with matters which relate to matters affecting the rights of members inter se

Naturally enough the wider the ambit of the power conferred on the directors the more difficult it will be for the court to determine the proper purpose of the power. It is for this reason that the English Courts have implied a subjective test and leave it up to the board of directors to determine the proper purpose. Lord Greene M.R. in Re Smith and Fawcett Limited(1) said that the directors must act

> "Bona fide in what they consider - not what a court might consider - is in the interests of the company and not for any collateral purpose".

Such a test would mean that it is up to the directors to decide the purpose of a power and their determination could not be reviewed by a court unless it was a determination.

It is suggested (2) therefore, that it is much easier to imply the requirements of natural justice than it is to determine what is in the best interests of the association. This view is reinforced by the knowledge that the Court's state that in a Court of Law not only must justice be done but manifestly be seen to be done.

Because the rules of natural justice are primarily concerned with the manner in which the power is exercised and not with whether or not the power is in the interests of the association, the observance of the rules of natural justice must go a long way to establishing the good faith of a director. It is submitted, therefore, that the courts' first inquiry should be to see if the expulsion

(1) [1942] Ch. 304, 306
(2) See Hepple 1970 C.I.J. 185,186

is procedurally correct, in compliance with the rules of natural justice. If the procedure is correct then the court should see if the power was exercised bona fide for the benefit of the company as a whole.
Further, in New Zealand and Australia, Megarry J's view might not be concurred in as it would probably be held that the directors must exercise their powers for the benefit of the total membership viewed in the light of their corporate objects, and not merely in the interests of a particular section of the membership.(1) (1)

Megarry J. was of the opinion that the power of expulsion granted by article 7(B) of the Company's articles was such as might require the council to exercise that power with great speed. It is a well accepted principle of natural justice that even though parliament has not used words designed to exclude natural justice, the nature of the power may be such that expediency requires their exclusion, for example, a policeman arresting a person does not have to give the apprehended person a hearing because to do so would unduly obstruct the performing of his duty. Whenever the court can see that the power is of such a nature that its immediate exercise is required it will be conclusive against applying the rules of natural justice. However, in Gaiman's case under the articles of association if it was intended to propose a member for election as an ordinary member of the council notice must be given not less than three nor more than twenty-one days before the

(1) See Australian Metropolitan Life Assurance Co. Ltd. v Ure (1923) 33 C.L.R. 199

date appointed for the meeting. In the present case the plaintiffs had given only five days notice. As the third day, the latest date possible fell on a Sunday, notice would have been impossible to give. The plaintiffs, by their own actions had created the sense of urgency, nevertheless it is submitted that the power of expulsion from the Association is not analogous to the cases where it has been held that an obligation to observe the rules of natural justice would obstruct the taking of prompt action.

In the great majority of cases in which expediency has been held to vitiate the rules of natural justice there has been some element of public safety or public health, or the power has been invoked to abate a public danger or nuisance. There have been cases outside these categories in which the court has allowed an official to deviate from the rules,(1) but it seems doubtful if the courts would uphold these decisions today under the present notion of "fairness". In Gaimans case there was no direct element of public safety involved, and the arbitrary time limit allowed for putting forward nominations (18 days) would seem to imply against there being any sense of urgency. Also a company can extend the latest possible time for giving the notice merely by altering its articles.

If Megarry J's analogy were correct it would mean that in a situation where there is a take-over bid by a "corporate raider" the directors could force a sale of the shares held by the offeror company, merely on the grounds of expediency.

(1) Ex parte Venicoff's [1920] 3KB 72, Bishop v Ontario Securities Commission (1964) 44 D.L.R. (2d) 24, R v Randolph 1966 S.C.R. 260

On the other hand, however, Megarry J. should have reasoned that there were adequate alternative proceedings provided for in the articles, in that the expelled member had a right to appeal to the council in a general meeting. Such an approach was not referred to by Megarry J. but it would seem to have been more in step with an accepted exception to the application of the rules.[1]

Megarry J, in cming to his second reason for refusing to apply the rules of natural justice, equaled a company limited by shares and a company limited by guarantee and held that because a company limited by shares could validly expel a member under the articles even though it deprived the member of valuable property rights, so should a company limited by guarantee be as able to do as no such rights were affected. Megarry J. relied on the fact that the plaintiffs' "liberty, property or means of livelihood" were notat stake.

Megarry J. reached his conclusion by drawing an anology from the cases dealing with companies limited by shares where in his view it could be readily inferred that the principles of natural justice did not apply to such companies. However, these cases - Re Gresham Life Assurance Society ex parte Penny(2) where there was a restriction on the right to transfer shares; Borlands Trustee v Steel Bros. & Co. Limited(3) and Hunter v Hunter(4) dealing with pre-emptive rights - the question of the applicability of natural justice did not arise, nor did the court

(1) Furnell & Whangarei High School Board. See infra p.36 [1973] 1 ALL E.R. 200
(2) (1897) 8 Ch. App 446
(3) [1901] 1 Ch. 297
(4) [1936] AC 222

consider its application in any way. The analogy does seem questionable in light of the decision in Enderby Town Football Club Limited v The Football Association Limited(1) and Pett v Greyhound Racing Association Limited(2) Both these cases involved disputes with a limited company, and in both cases the court proceded on the assumption that the rules of natural justice were applicable to it.

Underlying Megarry J's second reason and the application of the rules of natural justice is the assumption that the rules of natural justice do not apply to a corporated body. As has already been shown(3) an unincorporated association may exclude the principles of natural justice provided that the rules of the club do so expressly.(4) This view has also been expressed in New Zealand in relation to societies registered under the Incorporated Societies Act 1908,(5) in Perry v Fielding Club Incorporated.(6) In that case the respondent had been charged with having grossly misconducted himself within the meaning of the appellant club's rules by consuming liquor and becoming intoxicated on the club's premises when he was under a prohibition order. The club committee held an inquiry at which the respondent appeared. He was aware of the details of the charges preferred against him

(1) [1971] Ch 591.
(2) [1969] 19B 125. For a discussion of these two cases see supra p. 9 et seq.
(3) supra pp. 24-28
(4) See also MacLean v The Workers Union [1929] 1 Ch.602 MacQueen v Frackelton (1908) 8C.L.R. 673, Polsuns v Toronto Stock Exchange (1965) 46 D.L.R. (2d) 210.
(5) See D.J.White "The Law relating to Associations registered under the Incorporated Societies Act 1908(unpublished Thesis,Victoria University of Wellington (1972).
(6) [1929]N.Z.L.R. 529.

before attending the meeting, but having attended failed in the opinion of the committee to justify his conduct, and was therefore, suspended from membership. The respondent brought an action against the club to have the suspension removed, and for damages, on the ground that the committee's decision, having been arrived at without affording him an opportunity of cross-examining witnesses, was contrary to natural justice.

In the Supreme Court Smith J. granted the injunction and awarded damages because

> "Where the club concerned is a gentlemen's social club, where the charge is one of gross misconduct, where the member denies the charge and is prepared to face an inquiry, it is, I think, a principle of natural justice that he shall be present when those who allege the acts of gross misconduct against him give their evidence before the committee, and that he shall have the right to cross examine them (1) "

Although the Court of Appeal allowed the appeal by the club as it thought that the decision of the committee was arrived at in good faith, and the respondent had been given every facility for presenting a defence, both the joint judgment of Herdman and Adams JJ. and the judgment of Blair J. accepted that the principles of natural justice did apply to decisions of societies relating to expulsion of members.

> "...no matter how unfair or how unjust the action of an expelling tribunal might be, if it acted in accordance with its rules and in good faith the person expelled has no redress. To this we add another rule propounded by Kelly C.B. in Wood v Wood [LR. 9 Ex 196]. In speaking of the powers

(1) ibid p. 534.

> exercised by a committee of a society he said: "But they are bound in the exercise of their functions by the rule expressed in the maxim " Audi alteram partem", that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals" (1)

And Blair J. said

> "This court can interfere with the affairs of a social club only when its conduct of its own affairs transgresses what has been called natural justice, but which might better be called the fundamental rules of justice. This cannot mean that the inquiry must be conducted according to the procedures of a formal Court. It can mean no more than that the accused person in the circumstances of the case is given a fair and reasonable opportunity to answer the charge. And there might be a case where the circumstances are such that the denial of an opportunity to confront some or all of his accusers may be evidence of want of natural justice." (1a)

Furthermore in New Zealand (2) and the United Kingdom (3) it is well established that a trade union wishing to exercise a power to expel, suspend or discipline a member of the union must proceed in accordance with the requirements of natural justice. But unlike the United Kingdom most trade unions in New Zealand are incorporated under the Industrial Relations Act 1973 and its various predecessors, a point which has not hindered the New Zealand courts from implying that the rules of natural justice still apply.

(1) Per Herdman J. ibid pp 542, 543
(2) Law v Wellington Working Mens Club (1911) 30 NZLR 1198; McGregor v Young 1920 NZLR 766; Morten v Nicoll 1932 NZLR 685; Millar v Smith 1953 NZLR 1049, Armstrong v Kane 1964 NZLR 639.
(3) See Annamunthods v Oilfields Workers' Trade Union 1961 AC 945; MacLean v Workers Union 1929 1 Ch 602.
(1a) Per Blair J. ibid p. 546.

Megarry J's proposition that the rules of natural justice do not apply to an incorporated association might not be accepted in Australia either, for the application of the rules of natural justice in relation to trade unions incorporated under the Conciliation and Arbitration Act 1904 - 1959 is common-place. For example in Wishart v Australian Builders Labourer Federation(1) and Lynch v McLachlan(2) it was held that a power to disqualify a person from holding office is in the nature of a penalty and must be exercised according to the principles of natural justice.

England does not in fact have an equivalent Act to the Incorporated Societies Act 1908 or the Australian Conciliation and Arbitration Act,(3) therefore many voluntary associations register as companies under the Companies Act. It does not seem to follow that a incorporated society achieves some additional status upon incorporation so as to avoid attracting the presumption that the rules apply, that it did not have before incorporation when it was in fact bound by the rules of natural justice unless the rules of the club expressly excluded their application. Hepple(4) points out the implications that such a rule would have if the attention of the courts had been drawn to the corporate status of a University in a number of recent decisions.(5)

(1) (1960) 2 F.L.R. 298 (2) (1962) 3 F.L.R. 59
(3) In the case of trade unions, Megarry J. conceded that they have some of the attributes of corporate personality but not enough to forego the application of the rules of natural justice.
(4) (1970) CLJ 185, 187.
(5) See R v Senate of the University of Aston, ex parte Roffey 1969 2 QB 53 and Glyn v Keele University 1971 1W.L.R.487.

Within this part of his reason, Megarry J. took notice of the fact that:

> "Parliament has provided a generous set of statutory rules governing companies and the rights of members, as contrasted with the exiguous statutory provisions governing trade unions and even more exiguous provisions governing clubs" (1)

As has been previously shown (2) the courts will be very slow to construe a statute as excluding the rules of natural justice, especially if the statute is silent with respect to the expulsion.

The Privy Council on appeal from New Zealand in the case of Furnell v Whangarei High School Board (3) was asked to interpret a set of precise statutory provisions relating to the expulsion of a teacher. Furnell was a school teacher who had been suspended by the High School Board after compalints about his conduct and incompetence as a teacher had been heard by the board. While Furnell was so suspended he was not entitled to pay, therefore, he sought an order quashing the suspension on the grounds of natural justice. Furnell had not, in fact, been given notice of the charges against him or an opportunity to be heard before suspension.

The Privy Council, however, held by a three to two majority that Furnell was not entitled to notice or a hearing before suspension because the regulations made pursuant to theEducation Act set out an extensive code of procedure to be followed whenever a complaint was made against a teacher. The majority (4) reasoned that the

(1) supra p.335
(2) pupea pp 24,25
(3) for a discussion of this case see Evams (1973)36 MLR 439.
(4) Lords, Morris, Simon and Kilbrandon.

object of the regulations was to provide some additional protection for the teacher, and given that there were elaborate provisions outlining a hearing at a later stage, the omission of the hearing at the presuspension stage was deliberate.

The minority(1) on the other hand, reasoned that the it was unfair that a teacher should be suspended without a hearing, therefore, the terms of the statutory code did not reveal a deliberate omission of the right to be heard. Viscount Dilhorne was of the opinion that mere existence of statutory code of procedure did not prevent the court from applying to the stages of decision-making the procedural standards normally implied by the rules of natural justice.

Regardless of which of their Lordships' reasons are accepted, Furnell's case does serve to show the reluctance of the court to imply an exclusion of the rules of natural justice. Furnell's case turns on the question whether the statute did provide a code of procedure, however, in the Companies Act, on the other hand, there is no provision whatsoever relating to the expulsion of members from a company. A member's rights and duties are contained in the memorandum and articles of association, and not in the Companies Act. These two documents are contractually binding on members under Section 34 of the Companies Act.

(1) Lord Reid and Viscount Dilhorne.

The existence of a "generous set of statutory rules" in the Companies Act has no bearing on the question of a member's rights.

Gaiman's case should have turned on a question of contractual terms. The articles of the Association were binding on the members as a contract, and Megarry J's third reason was that the wholly unrestricted expulsion powers in article 7(B) in fact excluded the principles of natural justice, not the statute. Future courts, it is submitted, should be slow to interpret the Companies Act, regardless of how "generous" the Act is, as excluding the rules of natural justice.

The fourth reason of Megarry J's that the membership of the association involved no real interest in property and no question of livelihood or reputation, should go to decide any initial question of jurisdiction rather than to the ground of intervention itself.

Despite the incorrectness of the reasoning in Gaiman's case the writer would agree with the ultimate decision if for the third reason alone. Generally the courts are very reluctant to interfere with the internal management of a Company's affairs. The contractual effect of the article in the present case would support Megarry J's finding. However, Russell v Duke of Norfolk(1) and Edwards v SOGAT(2) do show that in some circumstances the validity of contractual terms purporting to exclude natural justice may be void as contrary to public policy.

(1) [1949] 1 ALL E.R. 109
(2) [1971] Ch. 354.

This will certainly be the case if there is some interference with a mans' "right to work".

Nevertheless, the company's officers and organs should always start with the presumption that the rules of natural justice apply where any question of expulsion is involved and then see if the contractual foundation on which shareholders rights are based, make it valid to expel the individual without a hearing.

III DO THE RULES OF NATURAL JUSTICE APPLY TO A PARTNERSHIP

A partnership is the relation which subsists between persons carrying on a business in common with a view to profit. It involves a contract between the partners. As a rule each partner contributes either property, skill, or labour, but this is not essential. The relation between partners is not that of debtor and creditor, nor are the partners, as such, trustees for each other or for their firm. The existence of a business is essential. The word "firm" is a short, collective name for the individuals who constitute the partners, and the name under which they trade is their firm name. The firm, unlike, the company is not a legal entity distinct from the members.

Expulsion from the partnership

As with an expulsion of a member from an unincorporated association, there is no inherent power to expel a partner from a partnership, therefore in the absence of express agreement among the partners conferring the power, no majority of partners of a firm has the power to expel a partner. This common law position is given statutory force by Section 28 of the Partnership Act 1908 which states:

> "A majority of the partners cannot expel any partner unless a power to do so has been conferred by express agreement between the partners".

However, a power to expel must be distinguished from special provisions as to the dissolution of the partnership which place the power to dissolve the partnership, on the occurrence of certain events occurring in the hands of one partner of the firm. Where the partnership agreement confers powers upon one of the partners to dissolve the firm if the conduct of the business or the result of the business, should not be to the satisfaction of one of the partners appointed in the agreement, that is not

equivalent to a power of expulsion and is easy to distinguish from such a power. On the other hand, where the agreement expressly provides that a partner may be expelled for certain conduct or in certain events, the application of the general principles governing the exercise of the power of expulsion is also clear. However, more difficult is the situation where this last mentioned provision is expressed as a power to "terminate" the partnership. The attitude of the courts towards such a provision seems to oscillate between regarding it as a power of expulsion on the one hand and one of "cancellation" or dissolution of the partnership on the other, depending on the conduct of the co-partner. Where a power to "terminate" or dissolve a partnership is exercised by the co-partners in respect of the conduct of the offending partner it may often occur that on such dissolution the partners who sought the termination will themselves continue in business minus the offending partner. In reality, the situation seems indistinguishable to that arising when the partner is expelled, particularly if, as is usually the case, the agreement provides that the expelled partner is to have his share paid out on the same terms as if he had retired from the firm. But while the practical result of the two procedures may appear to amount to the same thing as far as the excluded partner is concerned, in legal terms the distinction must be preserved since if what has been exercised is a "power to expel", the exercise of that power will be subject to a stricter scrutiny by the courts than will the exercise of a power to terminate and in any event under the terms of the partnership agreement itself the rights of an expelled partner may not, and often will not, coincide with those of a partner whose conduct has been expelled, it is to be expected that the consequences of his expulsion will be stipulated in the partnership agreement and in view of the nature of expulsion he will normally be "paid out", as if he were a retiring partner. Whereas if

his conduct caused the dissolution of the partnership the offending partners rights, in the absence of an agreement to the contrary, will be treated as in a dissolution and winding up of the firm which may produce a different result. Moreover, dissolution may be available where it is not possible to expel a partner and may be ordered, even if some of the partners do not desire it.(1)

1. Notice of Expulsion

There is no general statutory requirement as to the form or sufficiency of notice to be given to the expelled partner. Obviously, enough he must, receive notice in some form of his partners intention before he can be effectively expelled. The provision of the partnership agreement under which the power is exercised may itself expressly or by implication provide for the type of notice to be given and, if so, that provision must be strictly observed. If a notice of expulsion is served which is invoked under the clause providing for the power of expulsion, that notice cannot be invoked as a notice of dissolution of the partnership under another clause of the agreement, and the power may not be exercised without the concurrence of all those who in terms of the agreement are required to concur in its exercise this on Smith v Yules (2) the partnership agreement provided that on the ground of certain misconduct of a partner, his co-partners were entitled to dissolve the partnership by giving notice to the offending partner upon which notice the partnership should cease and be dissolved as if the offending partner had retired. It was discovered

(1) See Knight v Bell (1887) 13 V.L.R. 878 and Dodds v Bromfield (1873) A.J.R. 8
(2) (1852) 9 Hare 556

that Yules was greatly involved in debt and he had absconded, and did not return to work. Smith took exception to Yules conduct. The partnership consisted of Smith, Yules and Yules's son. Smith gave notice to Yules and his son under the power in the partnership agreement although the son had in fact done nothing on which Smith could found for this purpose. The Vice-Chancellor, Sir G.J. Turner, held that Smith could not expel Yules without the concurrence of the son, nor had he the right to dissolve the firm as far as the son was concerned. But as the son had adopted the notice after it was given, Smith was likewise precluded from treating the partnership as a continuing one and had actually brought about its dissolution though not a dissolution as provided for in the agreement and therefore not involving the consequences of a dissolution under that agreement.

In the New Zealand case of Wilkie v Wilkie (No. 2),(1) a partnership deed contained a provision as to one of the partners that, in the event of his using or drinking alcoholic liquors to excess or to such an extent as to affect his ability to take a leading part in the management of the business, he should absolutely forfeit all share or interest in the business forthwith, upon written notice to that effect signed by the other partners. It was further provided by the agreement that the named partner should only be entitled to a weekly salary of £6 for the period during which he should have conducted himself properly and taken an active part in the management of the business. The conduct of the partner was such as to justify his partners' expelling him under this provision. However, the offending partner was in

(1) (1900) 18 N.Z.L.R. 734.

Australia in a habitual state of drunkenness. Notice was therefore served on him in Australia. It was argued on his behalf at the trial that he was in such a state of drunkenness as to have been incapable of understanding the nature and effect of the notice. Edwards J. held that the notice of expulsion had in fact been served upon him by the other partners. His Honour drew an analogy from the service of notice on a lunatic partner and said it could be no answer that at the time of the service of the notice upon him, he was in such a state from drink as to be incapable of understanding its nature and effects.

Clauses providing for a power to expel a partner are construed strictissimi juris and the partners who seek to enforce the provisions must do exactly all that is necessary in order to enable them to exercise the power given by the provision. The reason for this rule is the likelihood of abuse that the power itself gives as well as the hardship it causes to the expelled partner. The court may therefore decline to give effect to an expulsion of a partner even where there is a power under the partnership deed to expel, if the expelled partner is able to establish that his co-partners have in fact used the power to advance some private interests or selfish motives, unconnected with the interests of the firm as such. An abuse of such a power is a breach of the general standards of honourable conduct which should exist among partners and is destructive of the mutual confidence which is a characteristic feature of a partnership.(1) Thus the more general the terms of the power to expel the less likely the expelled partner will be in task of establishing to the court's satisfaction that the partners have abused their power. But even in such circumstances the

(1) See Blisset v Daniel (1853) Hare 493, 68 E.R. 1022; Wood v Wood (1874) L.R. 9 Ex 190; Green v Howell (1910) 1 Ch. 495; Bond v Hale (1969), 89 WN (Pt 1) (NSW) 404 affirmed (1969) (PT 2) 90 W.N. (NSW) 119.

challenge may prove successful. For example in Blisset v Daniel[1] the partnership agreement provided for expulsion by the holders of two-thirds of the shares in an unincorporated company of any partner by giving him notice in writing under their hands of such expulsion in the following form:

> "We do hereby give you notice that you are hereby expelled from the partnership of John Freeman and Copper Company.
>
> Witness our hands this.... day of ....."

The clause did not require the partners to state their reasons for the expulsion nor did it stipulate any requirements by way of meeting of, or deliberation among, the partners before the notice was served. The partners in fact advanced no reasons and merely served the notice in the prescribed form. In the action brought by the expelled partner, however, he was able to show that they wished to get rid of him, not for the good of the firm, but because he opposed the appointment of the son of one of the partners as co-manager with his father and that the father had then faced the other partners with the alternatives that either he or the partner who objected to the arrangement must go. Therefore, the other partners signed the notice of expulsion but before serving it, they induced the partner to sign accounts, in order that he would be bound by them after he was expelled, while concealing from him at that stage their intention to expel him. The notice of expulsion was held void and the partner restored to his rights as a partner of the firm.

An example of the strict construction that the courts put on an expulsion clause is shown by the case of Bond v Hale.[2] The plaintiffs and the defendants were all members of a partnership governed by a partnership agreement which provided that if certain conditions were established "the other partners may by notice

(1) (1853) Hare 493, 68 E.R. 1022
(2) Supra. See also Re A Solicitors Arbitration [1962] 1 All E.R. 772

IXBA BARKER, S.C. Do the rules of natural justice apply to a company or partnership?

in writing expel the partner as in default". The three defendants purported to expel the two plaintiffs from the partnership pursuant to this clause and the question of law for the Court to determine was whether the partnership agreement gave the defendants the power to expel the plaintiffs. Street J. held that, upon its true construction, the expulsion clause only contemplated the expulsion of one partner by the joint action of all the other partners. Therefore, it did not expressly cover the expulsion of two partners by the remaining three. Street J's decision was affirmed on appeal. (1)

2. Right to be heard before expulsion

The right of a partner to be heard, in explanation or justification of his conduct will depend upon the terms of the clause conferring the power of expulsion. The early English cases of Wood v Wood,(2) Stewart v Gladstone,(3) and Barnes v Young(4) may be cited as supporting a general proposition that a partner must always be afforded a full opportunity of explaining his conduct before he is expelled. However, Edwards J. in Wilkie v Wilkie (No. 2)(5) made a distinction between two possible types of expulsion clauses; that where a power is given to expel a partner in respect of misconduct which is the ground of expulsion, and that where the power of expulsion is given in respect of some specific named act or conduct, as for example in this case. In the first situation Edwards J. held that the power could not be exercised until notice had been given to the offending partner of the particular act or misconduct with which he is accused, and he has had an opportunity of meeting it. Such a power must always be exercised

(1) Supra
(2) (1871) L.R. 9 Ex. 190
(3) (1878) 10 Ch. D. 626
(4) [1898] 1 Ch 414
(5) Supra

bona fide and for the purpose for which it was intended, and not for the purpose only of obtaining some advantage over the expelled partner. However, in the second situation the only question must be whether or not the specific act which by the contract of the parties has been made the ground of expulsion has been committed. Edwards J. found for the expelling partners in this case, holding that the provision was contractually binding on all the partners.

Also in England the rule can no longer be expressed in the terms of generality expressed in the earlier cases. In Creen v Howell[1] a clause in the partnership agreement provided that a partner who was guilty of a flagrant breach of his duties might,be expelled by his co-partners subject to a right of appeal to the arbitrator named in the partnership agreement. His co-partners in good faith served on him notice that he was expelled without giving him an opportunity to explain the conduct to which exception had been taken. It was held by the Court of Appeal that this was a valid notice of expulsion. Cozen - Hardy M.R.[2] explained the situation as follows:

> "It seems to me the fair reading of this clause... is this: The plaintiff, one of the two partners, believes and asserts that there has been a breach entitling him to determine the partnership. He gives notice of that, but he does not in any way act in a judicial character. All he does is to start the proceedings, leaving it open to the defendant in the action, the present appellant, to appeal to the domestic tribunal which the parties have agreed upon, namely, the arbitrator, to decide whether a case has happened which justifies the expulsion. If that is not sufficient, then by the ordinary procedures of the Courts of justice the Court has to decide that question. There has been a trial here, a number of witnesses have been examined,and the learned Judge has found without hesitation that there was a flagrant breach of the defendant's duty as a partner justifying undoubtedly, apart from the form of the notice, the expulsion. Is there any line of authorities...binding us to hold that the notice is

(1) [1910] 1 Ch 495
(2) ibid p. 505

> altogether bad and that all proceedings thereunder must be disregarded because no opportunity was given to the defendants to explain or because the notice did not more carefully specify the grounds of complaint?"

The Master of the Rolls was not aware of there being such an authority.

It must be noted however that the proposition stated in these two cases does not absolve the partners who are exercising the power of expulsion from giving the offending partner notice of the allegations made against him and a fair opportunity of a hearing in every case. If the partners themselves are placed in the position of the "tribunal" adjudicating upon their co-partners' conduct themselves, the rule in the older English cases will be applied and the expelling partners, in common with other tribunals adjudicating upon such issues[1] will be required to observe in relation to the offending partner these elements of the doctrine of natural justice. But where the adjudication is placed in the hands of another tribunal and not in the hands of the partners themselves, then the service of notice of expulsion by the partners, without affording the opportunity for a hearing, does not offend against natural justice because no exercise of judicial power is involved. All the partners have done, by their notice, is to raise an issue, which, if the expelled partner so desires may be adjudicated upon by the arbitrator. However, this view of the law appears at first glance to run contra to certain decisions of the English courts - namely Carmichael v Evans[2] and Clifford v Timms[1a] - Higgins and Ketcher[3] would certainly take this view. However, a close examination of these cases reveals that they are not concerned with expulsion, but with a

(1) See Labouchere v Wharncliffe (1879) 13 Ch D 346; D'Arcy v Adamson (1913) 29 T.L.R. 367; Andrews v Mitchell [1905] A.C. 78
(2) [1904] 1 Ch 486
(1a) (1908) 98 LT 64
(3) Higgins & Fletcher "The Law of Partnership in Australia & New Zealand" (3rd Edition 1975). p. 168

dissolution of the partnership consequent upon the partner's conduct, a distinction that has been previously noted.(1)

Edwards J. in Wilkie v Wilkie (No. 2)(2) and the early English cases(3) clearly establish that in exercising a power to expel a partner, his co-partners must act in good faith, otherwise the purported expulsion may be held void and the partner restored to his rights in the partnership. Since the partners are bound to exhibit to each other perfect good faith in the conduct of the affairs of the partnership, the same standard of conduct is demanded where they are acting under a power to dissolve the partnership as it does under a power to expel.

Since an invalid notice of expulsion of a partner is of no effect, it has been held in New Zealand by Edwards J. in Connell v Slack(4) and in England by Wood v Wood(5) that the partner against whom the purported expulsion was directed may not recover damages for wrongful dismissal. The logic of this rule seems to rest upon the view that no one can suffer damages from a notice of expulsion from a partnership which does not in fact achieve what it purports to do namely, expel him. It is submitted however that a partner may suffer damage as a result of the invalid notice, if for example it has been made public. The damage suffered in most cases would, be to the reputation of the wrongfully expelled partner, this of course would in most cases be effaced by his being restored to the partnership. However, there seems to be no logical reason why a court could not grant damages if the act of expelling the partner was done maliciously or without

(1) Supra P. 38
(2) Supra
(3) Blisset v Daniels (1853) 10 Hare 493, Wood v Wood (1874) L.R. 9 Ex 190; Stewart v Gladstone (1878) 10 Ch. D 626; Russell v Russell (1880) 14 Ch.D. 471; Barnes v Youngs [1898] 1 Ch 414
(4) (1909) 28 N.Z.L.R. 560
(5) Supra

probable cause. If such an action can be raised, it can be brought against the partners personally or against the firm.[1]

As has been previously stated,[2] where the partnership agreement confers a power on one of the partners to dissolve the partnership on the ground of improper conduct of another partner, the practical result of the exercise of that power approximates to that of an expulsion. Nevertheless, the legal consequences remain distinguishable, since in the exercise of a power to dissolve the partners are asserting a right which may be challenged in court or before an arbitrator if such is provided for in the agreement. The right of a partner to challenge the decision to dissolve the partnership in court lends greater weight to the requiring of the rules of natural justice where the partner is expelled. However, the approximation in the practical consequences of the exercise of the two powers would also seem to suggest that the rules of natural justice should be observed where the exercise of the power involved results in a "dissolution" to the same extent as they apply to an "expulsion". However, to adopt the words of Cozeno-Hardy, MR in Green v Howell[3] when the partners are exercising a power of dissolution, all they are doing is "to start the proceedings" leaving it up to the offending partner to challenge their decision, if he wishes, in the court. There is nothing in the way of a judicial exercise of power involved in serving a notice of dissolution and consequently there is no room for the application of the rules of natural justice to their actions. Further support is given to the distinction which is sought to be made, when the case of a power to expel in the event of a partner failing or omitting to discharge part of his

(1) See s.13 Partnership Act 1908
(2) Supra p.38
(3) [1910] 1 Ch. 495, 505

duties is concerned. In Smith v Mules[1] the court held that a power to expel a member, for failing to enter in the books of accounts of the partnership the monies received by him on behalf of the firm, could only be exercised if the omission was deliberate. However, no such rule exists where the same conduct justifies a dissolution in terms of the partnership agreement, for all that is required under s38(d) of the Partnership Act 1908 is the situation:

> "Where a partner, other than the partner suing wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him". (the emphasis has been added).

Hence in such a case all that is necessary is for the partners to satisfy the court that it is impossible for them to have that confidence in the delinquent partner which each has a right to expect. Naturally enough the loss of confidence cannot be caused by the partners' seeking to take advantage of the provision.[2]

In both a company and a partnership the expelled person is seriously handicapped by the courts' general reluctance to look beyond the element bargain between the parties as evidenced by the memorandum and articles of association or the partnership agreement, regardless of the hardship caused. If persons come together to form a legal relationship for commercial purposes, and enter into a contract it seems reasonable to assume that the parties should have the bargain enforced against them. As has become obvious throughout this discussion the meaning of natural justice cannot be determined precisely from any one decision and it is a question to be determined by the

(1) (1852) 9 Hare 556 supra
(2) See Re Yenidje Tobacco Co. Ltd. [1916] 2 Ch 426, 430

facts of each case whether the courts in the interests of fairness must supplement the written agreement. But it is submitted that the courts should always start with the assumption that the rules of natural justice apply to both a company and a partnership where a member or partner is being expelled. However, the proper construction of the agreement between the parties may in fact exclude the rules, but the courts should be very slow to adopt such a construction.

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